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Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1896.

No. 242.

THE AMERICAN PUBLISHING COMPANY,
Plaintiff in Error.

vs.

A. FISHER AND AARON KEYSER, Co-partners, doing business under the firm-name of The A. Fisher Brewing Company,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

By JEREMIAH M. WILSON,
Attorney for Plaintiff in Error.

F. W. von COTZHAUSEN,
of Counsel.

McGILL & WALLACE, LAW PRINTERS, Washington, D. C.

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Supreme Court of the United States.

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THE AMERICAN PUBLISHING COMPANY, Plaintiff in Error,

vs.

A. FISHER AND AARON KEYSER, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM-NAME OF THE A. FISHER BREWING COMPANY, Defendants in Error.

No. 242.

In Error to the Supreme Court of the Territory of Utah.

STATEMENT.

This is an action by the American Publishing Company, the above-named plaintiff in error, a corporation of Milwaukee, Wisconsin, for the recovery from the A. Fisher Brewing Company, of Salt Lake City, of the sum of $20,844.75, alleged to be due and owing by the defendant for the sketching, designing, lithographing, and printing of a certain trade mark and certain labels, advertising cards, hangers, views of Salt Lake City, stationery, etc., for the defendant in error. The contract under which this work and material is alleged to have been done and furnished is set forth in the complaint at pages 1 and 2 of the record, and is as follows:

"*March 28, 1890.*

"A. FISHER BREWING COMPANY,
"*Salt Lake City, Utah.*

"GENTLEMEN: Will submit sketch for your trade mark, with sketch for your bottle labels, also submitting finished proofs of plates, and will furnish you with one and one-half million (1½ million) labels in the course of a year after the proofs have been made, in black and bronze, with trade mark inserted, at fifty-five cents (55c.) per M. labels, and will duplicate this first year's shipment in each of the following five years at same rate after the expiration of the first year. Will also submit six different kinds of sketches for small advertising cards on style of cards submitted, printed in colors in front and black on back, furnishing you with 50 M. of each kind of cards after sketches have been submitted, as soon as ready, at $9.75 per M. cards. We shall also insert your trade mark and compliment card on your edition of the panoramic view of Salt Lake City, and will furnish you with 10 M. copies of said Salt Lake City view, with trade mark inserted after sketch of trade mark has been submitted to you, as soon as ready, at 97c. per copy (ninety-seven cents per copy) of said view. Will attend to the application for registration of your trade mark for you, and will submit designs for your different stationery headings and for a hanger in course of a year, with your trade mark embodied on same, furnishing you with 10 M. hangers and with 10 M. of each kind of the following stationery, as soon as ready, viz.: letter heads, 8¼x11; letter heads, 8½x5½; note heads, 5½x8½; statements, 5½x8½; bills, 8½x7; business cards and envelopes. Will also send you proof of bock card submitted in spring 1891. Price of hangers and price of bock cards, in colors, is 37½c. apiece (all prices are made on goods at our office at Milwaukee), with your name and trade mark inserted, and will furnish you 300 bock cards for the season of 1891. Terms, cash on delivery.

"Very truly, yours,

"AMERICAN PUBLISHING CO.,
"of Milwaukee, Wis.,
"per A. E. COTZHAUSEN, *Treas.*

"All terms and conditions included in above approved; read and agreed.

"A. FISHER BR'Y CO.
"A. FISHER."

(Signed in duplicate.)

The complaint further alleges substantial performance of the terms of said contract, except as to certain particulars wherein full performance thereof was prevented by the orders of the defendant in error; and plaintiff says that, although demand therefor has been made, no part of the amount due for the articles enumerated in said contract, or for those actually furnished, approved, and accepted by the defendant company, has been paid. (*R., p. 3.*)

The Fisher Brewing Company, in its answer (*R., pp. 3–9*), denies all the allegations of the complaint; and further, in explanation of the existence of the above-quoted contract, says that while the same was submitted to and signed by the said A. Fisher, one of the members of the defendant firm, as alleged, such signature or indorsement was obtained by means of certain fraudulent representations and statements as to the character and purpose thereof by the treasurer of the plaintiff company, Mr. Cotzhausen, who drew up the contract, and through whom the negotiations in question were being conducted; that the words "all terms and conditions "included in above approved, read, and agreed," were inserted without the knowledge of the said Fisher, and after his signature had been attached to said paper, and that "said indorsement was not made, nor was the said "paper so indorsed or delivered, with the intention or "understanding of any of said parties that the same "should in any manner take effect as an agreement, or "be in any manner binding upon either of the parties "thereto" (*R., p. 6*), but that said paper was signed, at the request of the said Cotzhausen, merely for the pur-

pose of enabling him, in conformity with one of the rules or customs of his company, to exhibit the same to said company as an evidence of the fact that he had called upon the defendant and submitted the proposition therein contained, as directed by said company.

After charging that the above proceedings were a part of a general scheme of the plaintiff in error to deceive, mislead, and defraud the defendant, the answer admits that the defendant did, upon the submission and approval of certain sketches and designs furnished by the plaintiff company, but as a separate transaction, order a part of the work and materials mentioned in the said alleged contract. The defendant, however, does not allege that these articles were ever paid for, or that payment therefor was ever tendered.

Thereafter, on the 10th of December, 1892, upon the issues made by the above pleadings, the case came on for trial in the District Court of the county of Salt Lake, before a jury of eleven persons, *nine* of whom afterwards returned a verdict for defendant (*R., p. 10*). During the progress of the trial, after the plaintiff's evidence-in-chief was all in, and upon the completion of the testimony of the first of defendants' witnesses, plaintiff objected to any and all evidence under the answer tending to establish the plea of fraud or false representation as therein set out, because insufficient in law as a defense, upon the overruling of which plaintiff excepted, whereupon counsel for defendant asked, and over the objection of plaintiff obtained, the leave of the court to file an amendment to its answer, to which ruling of the court the plaintiff duly excepted. (*R., pp. 42–3.*)

This amendment will be found on pages 8 and 9, and also on said pages 42 and 43 of the record, where the above proceedings are set out. It charges that, owing to certain misrepresentations as to various other purchasers having bought views of Salt Lake City from plaintiff

similar to those ordered by defendant, and as to the price of such views, and also as to the superior quality of the stationery, orders for which were solicited, of the real value of which defendant claims at the time to have been ignorant, defendant was induced to order these goods at about six times their reasonable market value.

Judgment having been entered by the court in accordance with the above-mentioned verdict, a motion for a new trial was made by plaintiff, overruled by the court, and an appeal duly taken to the Supreme Court of the Territory (*R., p. 91*), and on the 12th of June, 1894, the judgment of the District Court was affirmed (*R., p. 93*), from which decision plaintiff again appealed to this court.

Assignment of Errors.

The assignment of errors, as set forth in the record in this case (*p. 98 et seq.*), is as follows:

1. The Supreme Court, in its official opinion, has given expression to a spirit of partiality and local prejudice altogether uncalled for and unwarranted by anything that appears of record, in particular by saying:

"It is not our purpose to discuss at length the evidence introduced, or to attempt to say who ought to be believed or who should be disbelieved. We do say, however, that the entire transaction, so far as the plaintiff is concerned, bears all the evidence of the rankest kind of fraud and imposition upon the defendants. If this transaction is to be upheld, the defendants will be compelled to pay for enough advertising matter to run them for an indefinite period of time, variously estimated at from ten to one hundred years, the same being of a character that would ordinarily be changed each season. * * * The nature of the bargain is of such a ruinous character that it is quite cogent evidence that no sane business man ever entered into it except he was

imposed upon by some unfair means. * * * The course of dealing carried on by the plaintiff, as shown by the record, is certainly very singular and bears evidence of a deliberate conspiracy to entrap the defendants. * * * The appellant's brief nowhere contains a concise statement of the points, or any point, on which a reversal is asked. While it is very lengthy, it is difficult to determine from it just what occurred in the District Court that is complained of here. * * * We have discussed all the matters which we think are presented by the record, although we have omitted several about which the appellant's brief has much to say."

2. The Supreme Court erred in assuming that the jury, upon a square conflict of evidence, found the written instrument to be subsequently altered and a forgery.

3. The Supreme Court erred in its conclusion that the entire transaction, so far as the plaintiff is concerned, bears all the evidence of the rankest kind of fraud and imposition.

4. The Supreme Court erred in finding that the course of dealing carried on by the plaintiff, as shown by the record, "is certainly very singular, and bears the evi- "dence of a deliberate conspiracy to entrap the defend- "ants."

5. The Supreme Court erred in its construction of the pleadings, and especially as to the sufficiency of the defendants' plea of subsequent alteration and fraudulent pretenses.

6. The Supreme Court erred in ignoring the admission of the defendants as to certain work actually ordered and accepted.

7. The Supreme Court also erred in ignoring the fact that no offer to return the lithographic work, nor to pay for what was actually ordered and received, was either alleged or proven.

8. The Supreme Court erred in upholding the order of the court below amending and changing the plea of fraud after the plaintiff had rested.

9. The Supreme Court erred in assuming that the pretended alteration covered the words, "all terms and con- "ditions included in above approved, read and agreed," whereas the original document on file shows the interlineation to be confined to the words, "read and agreed."

10. The Supreme Court erred in holding that there was any legal evidence in the case from which the jury would have been justified in finding that the interlineations, both in the original contract and in the approvals, were fraudulently made and inserted, as claimed by defendants.

11. The Supreme Court erred in upholding the verdict concurred in by but nine jurors.

12. The Supreme Court erred in affirming the judgment of the court below.

13. In this assignment, the plaintiff "reiterates and "assigns the numerous specifications and errors of law "which occurred on the trial in the court below, and "which were then and there duly excepted to" (*R., p. 100, et seq.*), but, as these specifications are set forth in full in said assignment, and cover more than thirteen printed pages of the record, we will not here reprint them. To a number of the questions involved therein attention will hereinafter be called and reference made to the page of the record where the same will be found; but we respectfully request that the court will examine all of the questions presented in said assignment as it appears in the record, it being impracticable in this brief to reprint it because of its great length.

BRIEF.

I.

At the time of the preparation of this brief the case of *Springville City* v. *Perry A. Thomas et al.*, No. 103, on the docket of this court for the October term, 1896, heretofore argued and submitted, remains undecided. That case, as does also the one now presented, involves, among others, the question as to the constitutionality of an act of the Legislature of the Territory of Utah, approved March 10, 1892, entitled: "*An act to amend section 3371 "of the Compiled Laws of 1888, of the Territory of Utah, "in regard to trial by jury;*" and which said act provides as follows:

"SECTION 1. That section 3371 of the Compiled Laws of 1888, of Utah, is hereby amended so as to read as follows:

"SECTION 3371. In all civil cases a verdict may be rendered on the concurrence therein of *nine* or more members of the jury. When the jury have agreed on their verdict they must be conducted into court by their foreman. The verdict must be in writing and signed by their foreman, if he is a concurring juror, and if he is not a concurring juror, it must be signed by all concurring members, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If more than three jurors dissent they must be sent out again, but if not more than three jurors dissent, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which shall be done by the judge or clerk asking each juror if it is his verdict. If more than three answer in the negative the jury must be sent out."

In the case at bar the verdict of the jury, upon which judgment was subsequently entered, was concurred in by only *nine* of the jury. (*R., p. 10.*)

(a) *The Seventh Amendment and reasons for its adoption.*

Article 7 of the Amendments to the Constitution of the United States provides as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved.*"

The reasons which led to, and resulted in, the adoption of this amendment are of importance in the consideration of the question now before the court. The Constitution, as originally framed, contained, in the third article thereof, the provision for trial by jury in criminal cases, but omitted to make such a provision with regard to civil cases. Among other criticisms and objections that were made to the Constitution, as originally framed, was one to the effect that it did not contain a clause securing to the people the "enjoyment of the common law," and it was argued that the omission to provide for trials by jury in civil cases was equivalent to an *abolition* of such trials in other than criminal cases.

In No. LXXXIII of the Federalist, Mr. Hamilton undertook to meet this objection, and contended that merely because the trial by jury in civil cases *was not provided for* in the Constitution, such trials were not, for this reason, *abolished*; and he further asserts that Congress should provide for trials by jury in such cases even if nothing was said about it in the Constitution. The distinguished writer says:

"The power to constitute courts is a power to prescribe the mode of trial, and, consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or let it alone."

This argument, it will be observed, rests upon the proposition, that because the Constitution omitted to

provide for trial by jury in civil cases, such trials were not *abolished*, but it was left to the legislature to adopt that mode of trial or not at its discretion. But the "people of the United States," who were making this Constitution for themselves, were not content to leave that matter to the discretion of the legislature, and therefore, among others, the Seventh Amendment was introduced at the first session of Congress, was adopted, and thereby the people secured to themselves the right to trial by jury in civil cases beyond the power of legislative interference or abridgment.

And so we are brought to the question—

(b) *What constituted trial by jury at the time of the adoption of the Seventh Amendment?*

At the time of the adoption of the Constitution, the jury recognized by the common law consisted of *twelve* men, and *unanimity* of the twelve was essential to a valid verdict. The expression of the conclusion of the jury at common law imported "*the unanimous decision*, made by "the jury, and reported to the court on matters lawfully "submitted to them in the course of the trial of a cause." (*Bouvier's Law Dictionary.*) When, therefore, the trial by jury was provided for and secured by the Constitution, all that was embraced in a trial by jury at the common law was secured to the people, and one of the essential elements of such a trial was the *unanimous* verdict of the twelve members of the jury.

In the case of *Callan* v. *Wilson* (127 U. S., 549), this court said:

"And, as the guarantee of a trial by jury in the third article (of the Constitution) implied a trial in that mode *and according to the settled rules of the common law*, the enumeration in the Sixth Amendment of the rights of the accused in criminal prosecutions is to be taken as

a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have, in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of these rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well as those permanently or temporarily residing in the District of Columbia as those residing or being in the several States. * * * In *Reynolds* v. *United States* (98 U. S., 145-154), it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster* v. *Reid* (11 How., 437–460), that *the Seventh Amendment secured to them a like right in civil actions at common law.*"

This court having said, in the opinion from which the above is extracted, that the Sixth Amendment is to be taken as a declaration of the settled rules of the common law with respect to trials by jury in *criminal* cases, we are remitted to the question as to what were the settled rules for such trials in *civil* cases; and we respectfully submit that no rule is or was more thoroughly or universally settled at the common law than the rule that the verdict of a jury must be the *unanimous* expression of the twelve men who composed it.

The Constitution of the United States having used the words "trial by jury" in respect of *both* civil and criminal cases, it matters not whether such a trial is a civil or criminal trial; it must be taken to mean precisely the same thing, to wit, a trial by jury *as known and recognized at the common law.* It can not mean one thing in one class of cases and another thing in another class, because at the common law there was no difference as to what was required to constitute a valid verdict, namely, the concurrence therein of the minds of the twelve men composing the jury.

In a note to Sharswood's edition of Blackstone's Commentaries, vol. 2, book 3, p. 375, Christian says:

"The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the Legislature. But that the life, and perhaps the liberty and property of a subject, should not be affected by the concurring judgment of a less number than twelve, where more were present, was a law founded in reason and caution, and seems to be transmitted to us by the common law, or from immemorial antiquity. The grand assizes might have consisted of more than twelve, yet the verdict must have been given by twelve or more; and if twelve did not agree the assize was afforced—that is, others were added until twelve did concur. (See 1 Reeve's History of English Law, 241–280.) This was a majority, and not unanimity. A grand jury may consist of any number, from twelve to twenty-three, inclusive, but a presentment ought not to be made by less than twelve. (2 Hale, P. C., 161.) The same is true, also, of an inquisition before the coroner. In the High Court of Parliament and the Court of the Lord High Steward, a peer may be convicted by the greater number; yet there can be no conviction unless the greater number consists at least of twelve. (3 Inst., 30; Kelyng, 56; Moore, 622.) Under a commission of lunacy the jury was seventeen, but twelve joined in the verdict. (7 Ves. Jr., 540.) A jury upon a writ of inquiry may be more than twelve. *In all these cases, if twelve only appeared, it followed as a necessary consequence that to act with effect they must have been unanimous.* Hence, it may be suggested, as a conjecture respecting the origin of the unanimity of juries, that, as less than twelve, if twelve or more were present, could pronounce no effective verdict, *when twelve only were sworn, their unanimity became indispensable.*"

In the 13th volume of the Encyclopædia Britannica (p. 785), in an article on the subject of the jury, by Prof. E. Robertson, is the following:

"The ordinary jury in civil and criminal trials has

now been traced down to the point at which its constitution became stereotyped. An important point still wants some historical explanation. The rule requiring a unanimous verdict has been variously accounted for, but Mr. Forsyth's explanation appears conclusive. He regards the rule as intimately connected with the original character of the jury as a body of witnesses, and with the conception common in primitive society that safety is to be found in the number of witnesses rather than the character of their testimony. The affforcing of the jury above described marks an intermediate stage in the development. Where the jurors were not unanimous, new jurors were added until twelve were found to be of the same opinion. From the unanimous twelve, selected out of a large number, to the unanimous twelve constituting the whole jury, was a natural step, which, however, was not taken without some hesitation. In some old cases we find that the verdict of eleven jurors out of twelve was accepted, *but it was decided in the reign of Edward III., that the verdict must be the unanimous opinion of the whole jury.* Diversity of opinion was taken to imply perversity of judgment, and the law sanctioned the application of the harshest methods to produce unanimity. The jurors were not allowed to eat or drink but by leave of the justices, and they might be carried around the circuit in carts until they agreed. These rough enforcements of a unanimous verdict have been softened by later practice, *but the rule itself remains.*"

In a note to section 212, page 210, of Paschal's Annotated Constitution, it is stated:

"By a jury is generally understood to mean *ex vi termini* a trial by a jury of twelve men, impartially selected, in accordance with law, who must *unanimously concur* in the guilt of the accused before a conviction can be had. *Any law, therefore, dispensing with any of these requisites may be considered unconstitutional.* (*Work* v. *State*, 2 Ohio St., 296; *State* v. *Cox*, 3 English, 436; *State* v. *People*, 2 Parker, C. C., 322, 329, 402, 562; 2 Leading Cases, 327, and Note.) Story's Constitution, 3d edition, sec. 1779."

In the case of *State* v. *McClear* (11 Nevada, 36–60), the opinion states as follows:

"The terms 'jury' and 'trial by jury' are, and for ages have been, well known in the language of the law. They were used at the adoption of the Constitution, and always, it is believed, before that time, and almost always since, in a single sense.

"The jury for the trial of a cause was a body of twelve men" [describing their qualifications] "sworn to render a true verdict according to the law and the evidence given them, who * * * must return their *unanimous* verdict upon the issue submitted to them.

"All the books of the law describe a trial jury substantially as we have stated it; and a 'trial by jury' is a trial by such a body so constituted and conducted. So far as our knowledge extends, these expressions were used at the adoption of the Constitution, and always before, in these senses alone, by all classes of writers and speakers. (41 N. H., 550.)

"The whole current and drift of the authorities in the United States are, without exception, to the same effect."

In the case of *Lamb et al.* v. *Lane* (4 Ohio St., 177), the opinion states:

"That the term 'jury,' without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be. (*Work* v. *State*, 2 Ohio St., 296; *Willyard* v. *Hamilton*, 7 Ohio St., 111.)"

A jury *ex vi termini* imports twelve men. (*Turns* v. *Commonwealth*, 6 Metcalf, 231.)

In the opinion of the justices of the Supreme Judicial Court of New Hampshire (41 N. H., 552), it is thus stated:

"We are of opinion that no body of less than twelve men, though they should be by law denominated a jury, would be a jury within the meaning of the Constitution; nor would a trial by such a body, though called a trial by jury, be such within the meaning of that instrument. We think, therefore, that the Legislature has no power

to so change the law in relation to juries as to provide that petit juries may be composed of a less number than twelve, *nor to provide that a number of the petit jury less than the whole number can render a verdict in any case where the Constitution gives to the party a right to a trial by jury.*"

In the case of *Bradford* v. *Territory ex rel., &c.* (34 Pac. Rep., 66), the question was presented and decided as to the constitutionality of a law of the Territory of Oklahoma, providing that nine jurors may return a verdict (just as in the case of the act of Utah), and the court unanimously held that such provision was invalid as in violation of the Seventh Amendment to the Constitution of the United States.

In the case of *Kleinschmidt* v. *Dunphy* (1 Montana, 118–131), the act of the Territory of Montana authorizing a verdict by three-fourths of a jury was held unconstitutional and void, the court, in its opinion, saying:

"The origin of this mode of trial (by jury) is lost in the dimness of the past, but from the earliest period down to the time of the adoption of the Constitution, *unanimity* of twelve jurors alone has constituted a legal verdict. If the Legislative Assembly could dispense with one attribute or essential of a verdict, it could as well destroy the others, or repeal the right altogether. It can do neither; and, hence, the act in question is, in so far as it applies to actions at common law in which the value in controversy exceeds $20, unconstitutional and void."

This case of *Kleinschmidt* v. *Dunphy* was afterwards appealed to this court, where it will be found reported in 11 Wallace, 610–616. The case was, however, here decided upon another point, and this court declined, for that reason, to pass upon the question of the validity of the jury act, saying:

"Without attempting to decide whether the Territorial Legislature had or had not the power to legalize a verdict rendered by three-fourths of a jury, we think the proceedings were erroneous," etc.

It may be conceded that all matters pertaining to the selection of the jury, and not affecting its essential constituents or the essential constituents of a valid verdict are subject to legislative regulation, but we respectfully submit that, as to all matters that at common law were regarded as essential to the constitution of the jury, or as a part of the institution itself, they are preserved as they existed at the common law, and, therefore, that it was not competent for the Legislature of the Territory of Utah to change these essential and recognized constituents in any respect.

This rule of the common law, so originated and thus firmly established, namely, that the unanimous expression of the twelve men composing the jury is necessary to a valid verdict, was thoroughly known and recognized as an essential part of the common law trial by jury at the time of the adoption of the Constitution; and it was this trial by jury, and it was this rule of the common law, that the people of the United States secured to themselves by the adoption of the Constitution, and the amendments thereto, to which we have referred.

(c) *The right of trial by jury secured by the Seventh Amendment applies to the Territorial courts.*

In the case of *Springville City* v. *Thomas et al.*, *supra*, now pending before this court, undecided, counsel for defendants in error, both in brief and argument, insisted that, "the effect of the Seventh Amendment is to secure "a jury trial in United States Courts alone, and as Ter- "ritorial Courts are not United States Courts, the Seventh "Amendment is not applicable to a Territorial statute," such as is involved herein.

Congress governs the Territories under subdivision 2 of section 3, Article 4 of the Constitution of the United States, which provides that "*The Congress shall have*

"*power to * * * make all needful rules and regulations "respecting the Territories * * * belonging to the United "States.*"

This power in Congress is subject, however, to the fundamental limitations contained in the Constitution, and the amendments thereto, especially with respect of personal rights.

Take, for example, the case of *Mormon Church* v. *United States* (136 U. S., 44), where Mr. Justice Bradley, speaking for the court, says:

"Doubtless Congress, in legislating for the Territories, would be subject to these fundamental limitations, in favor of personal rights, which are formulated in the Constitution and its amendments," etc.

The Seventh Amendment is a fundamental limitation upon Federal authority, whether exercised within or under a Territorial government, or otherwise.

In the case of *Spies* v. *Illinois* (123 U. S., 169), this court, speaking of a Territorial statute, said:

"As that was a Territorial statute, passed by the Territorial legislature for the government of the Territory over which the United States has exclusive jurisdiction, it came directly within the operation of the Sixth Amendment, which guaranteed to Houpt a trial by an impartial jury."

It would seem that this reasoning is, in principle, equally applicable to the provisions contained in the Seventh Amendment.

In this connection it is further to be observed that Congress, by an act approved April 7, 1874 (*18 Stats.*, *27*), expressly recognized and affirmed the right of trial by jury in cases cognizable at common law, in the Territorial courts, as guaranteed and secured by the Seventh Amendment.

That act provided—

"That it shall not be necessary in any of the courts of

the several Territories of the United States (1) to exercise separately the common-law and chancery jurisdictions vested in said courts; * * * and that all proceedings heretofore had or taken in said courts in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be, and the same are hereby, validated and confirmed: *Provided, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.*"

So that, if any doubt had theretofore existed as to the applicability of the Seventh Amendment to the Territorial courts, that doubt has been removed by the act of 1874, *supra*, which in explicit terms provides that, in the Territorial courts, "no party * * * shall be deprived "of the right of trial by jury in cases cognizable at com-"mon law."

It would seem, however, that, aside from the above-quoted act of 1874, the question as to the applicability of the Seventh Amendment to the Territorial courts is no longer an open one in this court. This court, as far back as the year 1850, was called upon to decide this same question in the case of *Webster* v. *Reid* (11 How., 437–460). In that case a certain act of the then Territory of Iowa, with respect of certain actions at law, founded on contract, to recover payment for services rendered the owners of what were known as "the half-breed lands," provided that "*the trial of said suits shall be before the court, and not a jury.*"

This court there held that such a law was unconstitutional and void, saying, through Mr. Justice McLean, who delivered the opinion of the court, (p. 460):

"By the seventh article of the amendments of the Constitution it is declared: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'

"The act under which the above proceedings was had prohibited the trial by jury in matters of fact on which the suits were founded. In this respect the act was void."

See, also, *Callan* v. *Wilson* (127 U. S., 540), where the case of *Webster* v. *Reid, supra*, is cited with approval.

We have above discussed at length the character of "trial by jury" contemplated in, and intended to be guaranteed by, the Seventh Amendment.

It must result that the plaintiff in error herein was deprived of, and denied, this guaranteed right of "trial by jury," and that the judgment of the court below, rendered upon a verdict concurred in by only nine members of the jury, is a nullity and void, and should be vacated.

We now turn to an examination of errors alleged to have occurred in the courts below prejudicial to the rights of plaintiff.

II.

The court below erred in holding that there was no abuse of discretion in the trial court in permitting the filing of the amended answer.

On pages 42 and 43 of the record, the proceedings, with regard to the filing of the amended answer in the case at bar, are set forth. It appears that, during the progress of the trial of the case in the District Court, after the evidence in chief of the plaintiff had been submitted, and upon the completion of the testimony of the first of the witnesses for the defense, counsel for plaintiff "interposed an objection to any and all evidence under "the answer tending to establish the pretended plea of "fraud or false representation, as therein set out at "length, because insufficient in law as matter of de-"fense."

This objection was overruled and exception noted, whereupon the defendant prayed and obtained leave to amend its answer. An amendment was thereupon filed, alleging, in substance, that, on or about the 30th of March, 1890 (the day the contract in question in this case is alleged to have been signed) —

(1) It was falsely represented by the agent of plaintiff, Mr. A. E. Cotzhausen, that certain third parties had given orders for a large number of the bird's-eye views of Salt Lake City, hereinbefore mentioned, at $1.25 per copy; that, by reason thereof, plaintiff, having already prepared the necessary sketches for said view, could afford to sell them to defendant at 97½ cents per copy, but that said views were reasonably worth much more, but that the fact was that none of such other purchasers paid over 75 cents per copy for said views.

(2) That plaintiff's said agent further represented that certain sketches and articles of stationery, "particularly "set forth in the document alleged in the complaint," were of a superior quality, "and that the prices as stated "in said agreement were below the reasonable market "value thereof," that defendant was ignorant of the value of such articles, and of said bird's-eye view, with the exception of the bottle labels and bock cards mentioned in said agreement; and that the prices of the bird's-eye view and said other articles "were not of the "reasonable market value as therein stated, but that the "prices so fixed were six times higher" than such reasonable market value.

(3) "That, by reason of said false and fraudulent rep- "resentations said defendant was induced to sign the "proposal aforesaid, and not otherwise, and that said "document was afterwards altered as hereinbefore "alleged."

From the above it will be seen that, by this amendment, the whole nature and character of the defense is radically changed. The amendment does not purport to be, and is not, a mere amplification of the defense stated in the original answer, but is an entirely new and different ground of defense. It does not assert, as does the original answer (which was sworn to), that the proposal

and acceptance of the 28th of March, 1890, was not really designed or intended to be a contract, or that the defendants' approval of the sketches, etc., as alleged in said original answer, was a "mere act of courtesy and good will." On the contrary, this theory appears to be abandoned, and the amended answer proceeds upon the theory that the agreement set forth in the complaint was actually entered into for the purposes therein stated, reduced to writing and signed by said parties as alleged, but that the same is void or voidable because the assent of the defendant thereto was obtained by the said fraudulent representations.

In other words, while, under the original answer, the said alleged agreement was said to be, so far as defendants were concerned, of no effect whatever, and that it was "endorsed and delivered with the intent or understanding of both parties that the same should not in any manner take effect as an agreement, or be in any manner binding upon them," it is assumed by this amendment to have been a binding contract, as alleged by plaintiff, from the force and effect of which the defendants seek to escape by alleging it to be voidable because of the misrepresentations aforesaid as to the character and value of the various articles enumerated therein. It is, therefore, a *new* defense, entirely separate and distinct from, and clearly and absolutely inconsistent with, and a departure from, the defense set up in the original answer.

At the time of the offering of said amended answer, plaintiff duly objected on the four grounds set forth in the record at page 43, but the court overruled the objection, giving plaintiff, however, the privilege, if taken by surprise, of asking and obtaining a continuance; to which rulings plaintiff excepted. Leave to amend having been granted, as aforesaid, plaintiff moved that defendants be compelled to elect upon which of the two

pleas of fraud they intended to stand, which motion was likewise overruled and exception noted. (*R., p. 43.*)

That the allowance of this amendment over the objection and exception of the plaintiff was "a gross abuse of the discretion" vested in the District Court by law, for which the judgment below should be reversed, is apparent from the following considerations and authorities:

1. The rule upon the question as to when the alleged error of a court of first instance in granting or refusing leave to amend a former plea may be reviewed by this court, is stated in the case of *Gormly* v. *Bunyan* (138 U. S., 630–1), as follows:

"As long ago as *Mandeville* v. *Wilson* (5 Cranch, 15–17), and as late as *Chapman* v. *Barney* (129 U. S., 677), it has been held that the granting or refusal of leave to file an additional plea, or to amend one already filed, is discretionary with the court below, and not reviewable by this court, *except in a case of gross abuse of discretion.*"

2. The authority of the court below in the premises was conferred upon it by section 3256 of the Compiled Laws of Utah (*R., p. 96*), which reads as follows:

"The court may, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading."

3. The above quoted statute is simply declaratory of the common-law rule upon the subject, with the addition, however, of the element that notice shall be given the opposite party before the allowance of the amendment, which in this case was not done. (*R., p. 96*).

See—

Christal v. *Kelley*, 88 N. Y., 285;
Lane v. *Beam*, 19 Barb., 52;
Smith v. *Rathbun*, 75 N. Y., 122;
Chouteau v. *Hewett*, 10 Mo., 131;
Knott v. *Taylor*, 96 N. Car., 553;
Coombs v. *Low*, R. M. Charlt., Ga., 395.

4. Both at common law and in equity, the court had no power to allow the plaintiff to amend by introducing an entirely new and different cause of action.

1 Encyclopædia of Pleading and Practice, pp. 472 and 547;
Shipman Com. Law Pl., 142;
Heard's Civil Pleading, 71;
Andrew's Stephen's Pl., 167.

Nor could the defendant amend by setting up a new defense founded upon a transaction entirely different from that stated in the plea.

Heard Civil Pl., 71;
David v. *Preece*, 5 Q. B., 440;
Woodruff v. *Dickie*, 31 How. Pr., 164;
People v. *McHatton*, 7 Ill., 731;
Corby v. *Wright*, 4 Mo. App., 443;
Irwin v. *Chiles*, 28 Mo., 576.

5. A defense that is known to the defendant when he filed his original answer can not be set up by amendment on the trial.

Lewin v. *Houston*, 8 Tex., 94;
Cotton v. *Fidelity Casualty Co.*, 41 Fed. Rep., 506;
Gwin v. *O'Daniel*, 5 Tex. Civ. App., 112;
Case v. *Watson*, 22 La. Ann., 350;
Spyker v. *Hart*, *id.*, 354;
Louisville Underwriters v. *Pence*, 19 S. W. Rep., 10;
Chlein v. *Kabat*, 72 Iowa, 291;
Thoman v. *Railroad*, 60 N. W. Rep., 612.

In the case of *Railway Co.* v. *McCarthy* (96 U. S., 267, 268), this court says:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, *he can not, after litigation has begun, change his ground, and put his conduct upon another and different considera-*

tion. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. (*Gold* v. *Banks*, 8 Wend. (N. Y.), 562; *Holbrook* v. *White*, 24 *id.*, 169; *Everett* v. *Saltus*, 15 *id.*, 474; *Wright* v. *Reed*, 3 Dunf. & E., 554; *Duffy* v. *O'Donovan*, 46 N. Y., 223; *Winter* v. *Coit*, 7 *id.*, 288.)"

It would seem to result from all these authorities, and many other, that while, because of the difference in the circumstances surrounding each particular case, no definite rule can be laid down for the granting and refusal of amendments to pleadings, and that consequently the matter is left almost entirely within the sound discretion of the court, yet that where there is such a gross abuse of such discretion that the case of the opposing party is injured thereby, it is error for which the judgment below will be reversed.

We contend that the case at bar is obviously within the exception stated by this court in said case of *Gormley* v. *Bunyan*, above quoted, and that the judgment below should, therefore, be set aside.

III.

The court erred in failing to instruct the jury, as requested by plaintiff, that the evidence submitted on behalf of the defendants was insufficient in law to substantiate the charges of fraud set up in the original and amended answers herein.

We think it will be apparent to the court, from an inspection of the evidence produced by the defendants, as set forth in the record in this case, that the facts testified to by the defendants' witnesses, even if admitted to be true (as they are not), do not, in law, make out or constitute such a case of fraud and misrepresentation, as alleged in the answers of the defendants, as would justify a jury

in finding either that the written acceptance of the terms and conditions of the contract in question was a forgery, or that the signature of the defendant, Fisher, thereto was obtained by the fraudulent misrepresentations of the plaintiff's agent.

But before proceeding to examine the evidence for the purpose of demonstrating its said insufficiency, we desire to invite the attention of the court briefly to several propositions of law, and the authorities in support thereof, which we contend control the question with which we are now dealing. These propositions are as follows:

(*a*) Where fraud is set up as a defense to an action upon a written instrument, such as the one here in controversy, especially where such instrument is signed by the party sought to be charged thereby, and such signature is admitted to be genuine, the burden of proof is upon the party alleging the fraud to show all the facts necessary, in law, to constitute such fraud as would, upon a demurrer to the evidence, be held to be sufficient to nullify such instrument, and that these facts must be shown by clear and positive evidence, and by a fair preponderance thereof.

In the case of *Farrar* v. *Churchill* (135 U. S., 609), this court, speaking of the presumptions, degree of evidence, and general principles applicable to cases such as the present, in which fraud is charged, says (pp. 615, 616):

"The general principles applicable to cases of fraudulent representation are well settled. *Fraud is never presumed, and, where it is alleged, the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true.* It must be the *very ground* on which the transaction took place, although it is not necessary that it should have been the sole cause if it were proximate, immediate, and material. If the purchaser investigates for himself, and nothing is done to prevent

his investigation from being as full as he chooses, he can not say that he relied on the vendor's representations. (*Southern Development Company* v. *Silva*, 125 U. S., 247)."

See, also—

Schreyer v. *Scott*, 134 U. S., 405–9;
Hagar v. *Thompson*, 1 Black, 80;
Gaines v. *Nicholson*, 9 How., 356;
Conrad v. *Nicoll*, 4 Pet., 291;
Tucker v. *Moreland* 10 Pet., 58;
Babbit v. *Dottan*, 14 Fed. Rep., 19.

In the case of *Sturm* v. *Baker* (150 U. S., 312), the defendants, as in the case at bar, claimed that the writing above their signatures in certain memoranda of agreement was a forgery, admitting, however, that the signatures were genuine. On page 340 the court says:

"A great deal of proof was taken to establish this contention, but it fails, in our opinion, to show that the documents were forgeries. *The signatures being genuine, the burden of proof was upon the defendants to establish that the written part above the signatures was forged.*"

See, also, *Anderson County Commissioners* v. *Beall*, *infra*.

(*b*) We state our next proposition in the language of Justice Field, in the case of *Slaughter's Administrator* v. *Gerson* (13 Wall, 383), as follows:

"The rules of law applicable to cases of alleged misrepresentation by a vendor with respect to property sold are well settled, and render of easy solution the questions upon which this case must turn. The misrepresentation which will vitiate a contract of sale and prevent a court of equity from aiding its enforcement must not only relate to a material matter constituting an inducement to the contract, *but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled*

to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of its own inattention and carelessness. *Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he was deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness and been misled by over-confidence in the statements of another."*

See, also, 8 Am. & Eng. Ency. Law, page 643, and cases cited in Note 5; Story's Equity Jurisprudence (10th Ed.), secs. 200, 201, and Notes.

In Bigelow on Fraud, page 475, the author says:

"Where, however, the parties stand upon an equal footing—that is, where no relation of confidence, or the like, exists—*circumstances attending a transaction which are consistent equally with a fraudulent intent or with an honest purpose will not be treated as fraudulent.*"

Citing cases in Note 4.

We will hereinafter show that the present case comes within the principles just stated, and that the facts testified to by the witnesses for defendant, even if uncontroverted, would not constitute such fraud or misrepresentation as would amount to a valid defense to the action brought by the plaintiff in this case.

(c) The misrepresentations complained of or set up as a defense to an action upon a contract *must be as to matter of fact, and not of law.* Every one is presumed to know the legal effect of a contract he is signing, and misrepresentations as to such legal effect will, therefore, not invalidate the contract.

See authorities cited in 8 Am. & Eng. Ency. Law, p. 636, Note 1.

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We will hereinafter show that the present case comes within the principles just stated, and that the facts testified to by the witnesses for defendant, even if uncontroverted, would not constitute such fraud or misrepresentation as would amount to a valid defense to the action brought by the plaintiff in this case.

(*c*) The misrepresentations complained of or set up as a defense to an action upon a contract *must be as to matter of fact, and not of law.* Every one is presumed to know the legal effect of a contract he is signing, and misrepresentations as to such legal effect will, therefore, not invalidate the contract.

See authorities cited in 8 Am. & Eng. Ency. Law, p. 636, Note 1.

(*d*) This being the state of the law as to the character and degree of proof required in order to overcome the presumptive regularity and validity of a paper such as the one here in question, we desire next to call the attention of the court to the general rule as to when this court will review the evidence upon an exception to a refusal of a trial court to instruct the jury that the evidence is insufficient in law to justify a verdict. This rule is first stated in the case of *Hepburn* v. *Dubois* (12 Pet., 345–376), as follows:

"*After a verdict in favor of either party, on the evidence, he has a right to demand of a court of error that they look to the evidence only for one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party on a part or the whole of his case.*"

In the case of *Anderson County Commissioners* v. *Beall* (113 U. S., 241) this court again states this rule, as follows:

"In *Pleasants* v. *Fant* (22 Wall., 116–120), this court said, by Mr. Justice Miller, citing *Improvement Co.* v. *Munson* (14 Wall., 442–448), that '*in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.*' Those cases were cited in *Herbert* v. *Butler* (97 U. S., 319, 320), and this court there said, by Mr. Justice Bradley: '*Although there may be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render.*' It is true that in the above cases the verdict was directed for the defendant, *but where the question, after all the evidence is in, is one entirely of law, a verdict may at the trial be directed for the plaintiff, and where the bill of exceptions, as here, sets forth all the evidence in the case, this court, if concurring with*

the court below in its views on the questions of law presented by the bill of exceptions and the record, will affirm the judgment."

(a) *The fraud charged in connection with the signing of the contract.*

The only witness produced on behalf of the defendants who testified as to the said alleged fraudulent representations of plaintiff's agent, the circumstances connected with the signing of the contract as a result thereof, the ignorance of the defendants as to the character and effect of the paper signed, and the subsequent interlineation of the words importing acceptance and approval, is the defendant Fisher himself. He testifies (*R., p. 54*) that he had previously met Mr. Cotzhausen, the agent of the plaintiff company, in Kansas City; that he knew he was in the lithographing business, and that he had suggested to him that when he was in Salt Lake City he would be glad to have him call and see him.

Mr. Fisher then testifies (*R., p. 44*) that Mr. Cotzhausen did call upon him at his brewery on Sunday, the 30th of March, 1890, when they had a general conversation about lithographing, trade marks, labels, stationery, etc.; that Mr. Cotzhausen while there offered to make and submit for the approval of witness a design for a trade mark, and certain other articles enumerated in said agreement, saying (*R., p. 45*):

"I tell you what I will do. Here, I will make a memorandum of what you might need in the line of stationery, and so on, and submit you samples and proofs, and, if you want them, why you can take them."

The defendant then says that Cotzhausen started to write the paper that afterwards became the contract in controversy, and that, after it was written, he wrote another, handing one to witness to sign, whereupon

witness said, "I am not giving you an order for anything," to which the following reply was made by Cotzhausen (*R., p. 45*):

"Well, this is no order. Our company or firm, as a rule, when we drummers are out on the road—you see that it has happened that when these drummers have sent to their houses for sketches, they claimed they had been to certain firms and houses for sketches, and after that it was found out that such was not the case, so since that we have adopted the rule that if we send to our houses for sketches, a communication will have to be signed by a responsible party from the firm that these sketches are to be sent to, and that is the reason I want you to sign it. * * * This is no contract whatever, and, furthermore, it is Sunday. It would be no good anyway."

Witness then says that he thereupon signed said paper (afterwards admitting that he did not read it); that Mr. Cotzhausen wrote out another one, which he said was a copy, and left it with witness, after which they walked out of the office to a keg that had been tapped to get a glass of beer; that Cotzhausen drank his beer and went back to the office ahead of witness, who, just as he put down his glass, and as he was returning to the office, saw Cotzhausen take the pen and ink and write something more on that paper, and fold it up and put it in his pocket.

Witness does not, however, identify the paper he refers to as having been the one to which he had attached his signature, or as being the one in question in this suit, but, on the contrary, on the same page, says that *he never saw the said paper after he had so signed it.* Nor is he able to describe or say what was written thereon by Cotzhausen at the time mentioned, if anything. (*R., p. 46*). As to this, he only says that the words, "All terms and "conditions included in above approved, read and "agreed," were not there when he signed said paper,

but afterwards admits that he did not read it, saying that he "just glanced over it"—that he did not even read anything as to quantities, etc., nor did he read the copy handed him, but put it away in the desk without looking at it, and afterwards lost or mislaid it.

This was all the evidence adduced by defendants to prove the charges of misrepresentation, forgery and fraud made in connection with the signing of said memorandum of agreement. Taken by itself, and even if it were uncontradicted and unrebutted by the other evidence in the case, and even if such a contention as that set up by the defendants were not made utterly untenable by the subsequent ratification and carrying out of the provisions of said contract (which we will hereinafter show), this evidence would be thoroughly incompetent and inadequate to justify such a verdict as that rendered in the present case, and any court would be compelled, in the exercise of the power conferred upon it by law, to set it aside if the case were permitted to go to the jury at all.

The facts testified to by the defendant Fisher as constituting the misrepresentation and fraud charged in the answer are not such as to make out the degree of misrepresentation and fraud held by this court to be requisite and necessary to be affirmatively and clearly proven in order to nullify such a paper as the one in question. We can see nothing in the statements alleged to have been made by the plaintiff's agent, Mr. Cotzhausen, that is at all inconsistent with the theory that the defendant Fisher was thoroughly aware of the contents, character and legal effect of said paper.

Mr. Fisher testifies that Cotzhausen informed him that the said paper was not an "order." That was true. On its face it simply purports to be a proposition by plaintiff to submit sketches of certain work, which, upon approval, plaintiff agrees to furnish at certain prices, the terms of which proposition are accepted and approved

by the defendants upon the condition that the work is satisfactory. The defendant also says that Cotzhausen told him that said paper was "no contract whatever." That was also true in the sense in which he doubtless meant it, to wit, that it was only a conditional agreement and not binding upon the defendants at that time, as it required a further act on their part to make it binding, namely, the approval of the sketches and work.

It was only upon this *approval* of the sketches and designs submitted that the defendant obligated himself to take and pay for the articles enumerated in said contract. There was nothing in said paper *compelling* the defendant to approve these sketches, or any of them. He could have rejected any or all of them if unsatisfactory, or if he had felt so disposed, either on account of the excessive price thereof or otherwise; and in the mean time he had the fullest opportunity to make whatever investigations he might desire or think prudent to make as to the fairness of such prices.

The same is true as to the alleged representation that, as the contract was made on Sunday, it was not binding upon the parties (which Mr. Cotzhausen, in his testimony in rebuttal, denies having made, *R., p. 65*). If such had been the case, and the defendant had desired to do so, he could have notified plaintiff, at any time before the approval and acceptance of the work, that he would not be bound by said contract, and could have refused to approve and accept any of said articles on that ground, instead of which, as we will presently show, he admits that, after referring to the contract, he approved a number of said sketches, that he placed orders for a part of said work, and that he expressed perfect satisfaction therewith, thus effecting a subsequent ratification of the contract.

And Mr. Cotzhausen's above quoted reason for desiring that this proposition and acceptance be reduced to

writing and signed by the defendant Fisher was as reasonable and business like as anything well could be. His company, to prevent the trouble and expense of making costly sketches for nothing, and to have something definite on which to work, required its traveling men to put their proposals in writing, and obtain the acceptance and approval of the terms thereof by the firm to whom such propositions were made, and Mr. Cotzhausen was simply complying with this requirement of his house. His said explanation of the adoption of such a course is certainly not inconsistent with business principles or indicative of fraud or bad faith; and the fact that it is remembered and testified to by the defendant himself, only makes it the more apparent that he did know exactly what he was doing when he signed the paper in question. Such a proposition could mean nothing else than what upon its face it purports to mean, and the contract signed by the defendant as a result thereof necessarily implies that he was aware of its character and effect.

The defendant Fisher further testified that he was 40 years of age; that he reads and speaks the English language; that he has had good schooling, is not blind, and that he is a man of business experience, his partner entrusting the whole management of the brewery to him; that he experiences no trouble in transacting business generally, and that, in his experience as a business man, if he signs a valuable paper he reads it first, explaining his alleged failure to do so in the present case by saying that he was told that the contract in question was not a valuable paper, but a valuable memorandum. On page 53 of the record witness admits that the only fighting point in the case is that he only ordered 250 views while 10,000 were furnished (that being the number named in the contract), and that they did not order the envelopes sent and included in the bill.

The defendant further admits that he received the

goods mentioned in the complaint and actually used some of them, and that he never made any offer or tender to pay anything at all, but on the contrary refused so to do, *unless plaintiff "would throw up the whole contract"* (*R., p. 53*) *"and surrender the paper he held over them"* (*R., p. 51*). From the defendant's testimony it appears that shortly after the receipt of said goods, Mr. Cotzhausen called for the purpose of collecting a bill for $2,040, which had theretofore been presented by Mr. Smith and payment refused on the ground that the prices were excessive. At this interview the defendant Fisher asked Mr. Cotzhausen if he had the original agreement with him. The same was produced and handed to defendant to read. The defendant, after reading it (as he says) for the first time, testifies (*R., p. 51*):

"We started to talk to him regarding the stationery, this $2,000 bill, and of other goods which were not ordered, and as to the price of $14.75 a M. We showed him that we could buy lithographed stuff much cheaper. At last Mr. Cotzhausen said he wanted to settle that bill, he was here to settle it, *he was willing to throw off about $600*, he would take something like $1,400 for the whole bill. I said all right, we will settle on that basis. When Williams was in the act of making out a check, I called him into the back office and I told him he could have that check *provided he would give us that paper he held over us*, then he could have it and give a receipt that everything was settled between the publishing company and the brewing company, which proposition Mr. Cotzhausen refused to accept."

If the defendant did not recognize this contract as binding upon his firm, why should he have been anxious to be released from all obligations under it, and why was he desirous that it should be surrendered upon payment of said bill? If his signature thereto was fraudulently obtained, as alleged, why did he not then and there say so and promptly repudiate all liability for the goods

which he claims not to have ordered? If the words endorsed upon said contract importing approval and acceptance of the terms thereof, and to which his signature is attached, were, as he alleges, interlined after he signed the same, why did he not accuse Mr. Cotzhausen of having so interlined them and disclaim all responsibility therefor? Instead of doing this, he attempted to force a surrender of the same by a refusal to pay the bill unless it was surrendered, thus distinctly recognizing his liability.

In view of the above admissions, and of the absolute failure of the defendants to show by their evidence any such fraud as would constitute a valid defense under the authorities above cited, we respectfully submit that the presumptive validity and regularity of this contract is not overcome, and that the defendants should be held accountable thereunder, unless the same was rendered voidable by the *subsequent* fraud of the plaintiff, to a consideration of which we now turn.

(b) *The fraud alleged and testified to in connection with the prices charged, and transactions and dealings subsequent to the signing of the contract.*

The various fraudulent acts alleged in the original and amended answers to have been perpetrated by the plaintiff are, substantially, as follows:

(1) The original answer sets forth that some time after the signing of the contract by the defendant Fisher, the defendants received from the Beck & Pauli Lithographing Company, a corporation of the same city, with whom plaintiff was co-operating, certain sketches, which the said company pretended were merely samples "sub-"mitted for the inspection and approval of the said de-"fendants;" and that they were requested to endorse the same if the work seemed to be satisfactory; that plaintiff and the said Beck & Pauli Lithographing Company

are really the same concern operating under different names for the purpose of misleading and deceiving the public.

(2) That when defendants approved the said sketches and samples, they had no intention of binding themselves to order any quantity of said articles at any price, nor to consummate any agreement with the American Publishing Company, all of which was well known to plaintiff; that after said sketches were so approved, and without any reference to said agreement, defendants ordered a certain limited quantity of stationery and other articles at prices agreed upon at the time of such order; and that, after said articles had been so ordered, defendants were notified that the same had been shipped, but that, at the same time and in the same car in which the articles so ordered were shipped, plaintiffs caused large quantities of stationery and other articles that had not been ordered, but which are referred to in the contract, to be shipped.

(3) That plaintiff, with the fraudulent intent to induce defendants to take into their possession the said stationery and other articles that had not been ordered by them as aforesaid, falsely represented to defendants that the said shipment contained only the articles ordered by the defendants as above; that, induced by said fraudulent representations, and at the special instance and urgent request of plaintiff, defendants caused the whole of said goods (containing both the goods admitted to have been ordered and those alleged not to have been ordered, but which are mentioned in the contract) to be taken from the depot and deposited upon the premises of defendant, thus accomplishing their delivery and acceptance; and that, upon discovery of the fraud, defendants notified plaintiff that they would not accept said goods and to take them away.

(4) The substance of the amended answer is given in this brief in another connection, and it is only necessary to say here that it charges misrepresentation by plaintiff as to certain facts concerning the views of Salt Lake City hereinbefore mentioned, and as to the reasonable market value or price of said views and of the stationery mentioned in said contract, of which value defendants claim to have been ignorant and without the means of informing themselves at that time.

The first of the witnesses produced on behalf of the defendants to substantiate these charges of fraud, was J. C. Williams (*R., p. 47*), the bookkeeper of the defendant company, who says that the first person he met in connection with plaintiff was a Mr. Smith, who called at the brewery with sketches and samples of labels, stationery, and advertising cards; that the said Smith asked Mr. Fisher to O. K. them, *which he did by writing his name on each sample or sheet;* that witness, under the authority given him by Mr. Fisher, ordered the stationery enumerated on page 38 of the record; that Smith, upon being asked, said that 250 views of Salt Lake City would cost 80 cents instead of 97½ cents as set forth in the contract, upon which Mr. Fisher O. K'd the sketch, and that no prices were quoted upon the stationery.

That the bill of $2,040, hereinbefore mentioned, was brought to the office of defendants about February 23, 1891, by Mr. Smith, who said that the goods had just arrived at the freight depot, and that he desired to collect the money; that Smith represented that a full car load of goods had been consigned to him, containing not only the goods of defendants but those of other customers of the plaintiff in Salt Lake City, and that if defendants would advance $380 for freight charges upon said goods (which was done), he would turn over the car to them and collect and return the charges due by the other customers; that the teamsters of the defendant

were then sent to the depot for said goods, got them and brought them back to the brewery, where they were stored. This is his explanation of the acceptance of the goods alleged not to have been ordered.

The witness also says that in January, 1891, he was familiar with prices on office stationery; that the prices charged by the plaintiff ($14 a thousand) were excessive to an extent of $12 per thousand. This statement is ridiculous. Plain printing and the paper on which the printing was done would cost much more than $2 a thousand. The defendant, Fisher, however, with this means of informing himself at hand, appears not to have consulted him at the time of entering into the contract, but left the matter of ordering the stationery to him, which witness did without mentioning the price.

Witness further says that the defendants were not in need of the quantity of stationery delivered, although he admits that he ordered said stationery (with the exception of the envelopes) in the quantities delivered and charged for in the two bills for $181.85 and $2,045.40. (Compare order on page 38 of the record and the bills on page 16 thereof.)

The defendant, Fisher, himself testifies that when Mr. Smith called with the sketches and asked him to O. K. them he simply wrote his name on the back, and that the words, "accepted as per agreement of March 28, 1890," "O. K., silver, blue and black," "approved October 29, 1890, to go on back of small advertising cards," etc., were not on said sketches at the time he endorsed his name thereon, but were afterwards inserted (*R., p. 47*), although *he admits that he meant to have his signature considered just what was written over it* (*R., p. 52*), *and that these words indicated directions given verbally;* that when Mr. Smith called with the sketches witness got out his duplicate copy of the agreement, and, after reference thereto, found it all right and O. K'd the samples (*R.,*

p. 55). Witness also testifies substantially, as does Williams, as to the receipt of the shipment of goods and the presentation of the bill for $2,040.40, as to the finding in said shipment of goods not ordered, and also to the fixing of the price of the views at 80 cents apiece instead of 97½ cents, as stated in the contract.

C. J. Pauli (*R., p. 56*) says that he formed the Beck & Pauli Lithographing Company; was at one time its president, and that he continued with the concern for about half a year. He then testifies as to the aggregate value of the work in question, fixing it at considerably less than charged in the bill and contract. (*R., p. 57*). He, however, acknowledges that he never followed the lithographing trade practically, and, in testifying as to the bird's-eye view, states facts tending to increase its market value rather than diminish it. A letter by witness to defendants is introduced in evidence (*id.*), in which witness says that the plaintiff company and the said Beck & Pauli Lithographing Company are "actually sailing under the same flag:" that he left the latter company because of its crooked dealings, etc., and that many prominent men have been victimized by its secretary, Mr. Cotzhausen. The witness does not state who were victimized, nor in what way, nor anything that would make such a letter material or competent evidence.

George Martin (*R., p. 60*) testifies that he was foreman of the defendant company in 1890 and 1891; that he saw Mr. Cotzhausen in the brewery one Sunday afternoon writing, when he was sent for to get a sample of a beer label; that about four or five weeks later he saw Smith at the brewery; that Smith said there was a paper in the desk that he would like to get, and showed witness exactly where it was; that witness opened the desk and Smith took the paper out, put it in his pocket and went away, promising to bring it back; that witness does not know what paper it was, did not look at it, and

totally fails to identify it as the duplicate copy of the agreement, which, in his testimony (*supra*), the defendant Fisher claims to have lost. Mr. Smith, in rebuttal, says that the paper referred to was a subscription list that he had left there the day before. (*R., p. 70*).

J. W. Peters and Timothy K. Sage (*R., p. 61*) testify as to the excessive prices charged, fixing the value at much less than the amount named in the contract, and F. K. Gillespie (*R., p. 61*) says that he bought some views of Mr. Smith at 75 cents apiece, but says that he was told that a less amount would be more; that 500 would be from 80 cents to $1.00.

John Montgomery, secretary of the Real Estate Exchange (*R., p. 62*) says that the Exchange did not order any views, the amended answer charging that plaintiff represented that it had; and W. F. Colton (*R., p. 62*) testifies to the same effect, so far as he knows, as to the Rio Grande and Western Railroad Company.

From the testimony for the defense, as set forth in the record and as above extracted, it appears that the contract in question in this case was actually signed by the defendant Fisher upon the statement and understanding testified to by the defendant himself on page 45 of the record; that at the time said contract was so signed it was in contemplation of both parties thereto that certain work enumerated therein should be performed, and, upon approval thereof, that the articles mentioned should be furnished and paid for by the defendants; that in pursuance of said agreement this work was performed, and that sketches and samples thereof were duly submitted for approval in accordance therewith; that these sketches and samples were approved by the defendants; that as soon thereafter as the same could be completed, the said articles were shipped and delivered to the defendants, and the same accepted and partially used by them; that no fault was ever found or complaint

made as to the quality or excellence of such work and materials, but that, on the contrary, perfect satisfaction was expressed therewith, as appears by the correspondence set forth on pages 17 and 18 of the record.

By this evidence it also appears that the defendants had the fullest opportunity before approving said sketches and samples, and even before signing said contract, to make any inquiries that they might desire to make as to the character of the work and materials so ordered and furnished, and as to the reasonable market value thereof, and that nothing was done to prevent them from taking every precaution usually taken by prudent business men in regard to matters of this kind; that such work was not from its nature, at the time said contract was entered into or afterwards, within the exclusive knowledge of the agent of the plaintiff who drew up said paper, but that the state of the art of lithography, and the value thereof, were well known in business circles in Salt Lake City and elsewhere, as appears by the testimony of the expert witnesses, Peters and Sage, produced on behalf of defendants (*R., p. 61*); that even if the defendant Fisher himself was ignorant as to the reasonable value of such work, he had in his employ a bookkeeper who, he says, always attended to the purchasing of office stationery, and who professed to be well acquainted with the value of such work, and if the defendant did not avail himself of this means of information it was certainly not the fault of plaintiff's agent, as nothing was done to prevent him from postponing the consummation of the transaction until he had made whatever inquiries he might think proper.

Therefore, in view of the above stated principles of law, requiring the facts alleged to constitute such fraud or misrepresentation as will invalidate a contract, duly signed by the party to be charged thereunder, to be *clearly* made out, by affirmative proof, and precluding a

purchaser or contractor " where the means of knowledge " are at hand and equally available to both parties, and " the subject of purchase is alike open to their inspec- " tion, if he does not avail himself of these means and " opportunities," from saying that he was deceived by the vendor's representations, and in view of the further fact that all the facts and circumstances necessary to a recovery in the present case are proven by the positive and unequivocal testimony of Messrs. Cotzhausen (*R., pp. 12, 15, 62*), Smith (*R., pp. 13, 37, 67*), and Kuschbert (*R., pp. 13, 37, 67*), and that no other defense is made, or attempted to be made, than the fraud and misrepresentation above set forth, we think this verdict should be set aside.

IV.

Subsequent Ratification of Contract by Defendant.

Even if it be true, as claimed by the defendant, that there was any fraud or imposition practiced by plaintiff in procuring the execution of the contract herein, still the dealings of the defendant with plaintiff thereafter had (see extracts from testimony, *supra*), expressly recognize the validity of such contract and reaffirm the same. (See also correspondence set forth on pp. 17–21 of the record.)

Fraud is a personal grievance, and may be waived. It merely renders a contract *voidable*, giving to the aggrieved party an option to disaffirm it, but until disaffirmed it remains good.

1 Bigelow, 120–121, and note.

In the case of *Grymes* v. *Sanders*, (93 U. S., 55), this court held:

" Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of facts,

at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred."

Citing—

Thomas v. *Bartrow*, 48 N. Y., 200;
Flint v. *Wood*, 9 Hare, 622;
Lloyd v. *Brewster*, 4 Paige, 537;
Minturn v. *Maine*, 3 Seld., 220;
Campbell v. *Fleming*, 1 Ad. & El., 41, &c.

The same thing, in effect, is thus stated in 1 Bigelow on Fraud, at page 436:

"The defrauded party to a contract has but one election to rescind the same. If he once determine his election, it is determined forever. Hence, if it be shown that he has at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, his election is irrevocable. Nor has the injured party power to keep the question of election open so long as he will."

See, also—

8 Am. & Eng. Enc. Law, p. 637 and notes;
Whiting v. *Hill*, 23 Mich., 309;
Pratt v. *Philbrook*, 41 Me., 132;
Veerol v. *Veerol*, 63 N. Y., 45; and
Bridge v. *Penniman*, 105 N. Y., 642.

In this connection, it is proper to notice, briefly, the contention of defendant as to the supposed invalidity of the contract sued on, because alleged by defendant to have been executed on Sunday.

In the first place, it is not admitted that the contract was executed on Sunday, and even if it were so executed, it would not for that reason be invalid.

At common law, contracts entered into on Sunday were not invalid.

Swan v. *Swan*, 21 F. R., 299;
Richmond v. *Moor*, 107 Ill., 429;
24 Am. & Eng. Enc. Law, p. 555.

In the case of *Gibbs* v. *Brooker* (111 U. S., 597), this court held that—

"The mere signing of a contract on Sunday, but not delivered on that day, does not avoid the contract."

It is well established that affirmance on a week day of a contract of bargain and sale entered into on Sunday makes it valid.

Van Hoven v. *Irish*, 10 F. R., 14;
Gregg v. *Wyman*, 4 Cush., 322.

See, also—

R. R. Co. v. *Tow Boat Co.*, 23 How., 218;
Hopkins v. *Stefan*, 79 Wis., 45.

That the defendant company did expressly and repeatedly reaffirm the contract, and treat it as a valid and binding agreement between the parties, is conclusively established, not only by the evidence and circumstances to which attention has already been called, but also by the correspondence had between the parties, and which is set forth in the record at pages 17–21, inclusive, to which the attention of the court is respectfully asked.

In so far as any of the letters here referred to contain expressions that may seem, in any way, to reflect upon, criticise, or find fault with the plaintiff company, we beg to refer to the testimony of one of defendants' main witnesses, J. C. Williams, wherein he explains just what he meant by the various expressions used by him in certain of the letters (*R., pp. 38–42*), and which explanation relieves said correspondence of any injurious implication that might, perhaps, otherwise seem to result from some of the expressions used.

V.

The defendant makes no offer to return or pay for the goods admitted to have been ordered, accepted, used and retained, nor does the pleading filed by defendant make any allegation of tender or offer to return or pay for said goods.

As will appear from the record here (*pp. 38, 47, 51, 53*), the defendant company admits that it ordered and received the following goods from the plaintiff company, no part of which has ever been paid for:

1½ million labels, at 55 cents	$825 00
250 views of Salt Lake City, at 80 cents	200 00
300 bock beer cards, at 37½ cents	112 50
10 M. letter-heads, at $14.75 per M	147 50
10 M. note-heads " " " "	147 50
10 M. statements " " " "	147 50
10 M. bill-heads " " " "	147 50
10 M. business cards, at " " "	147 50
6 M. small adv. " " " " "	88 50
1 M. bank checks " " " "	14 75
	$1,978 25

It, therefore, appears that while the defendant seeks a rescission of its contract with the plaintiff, yet it makes no offer either to return or to pay for any of the above goods so admitted to have been ordered and received by it as aforesaid.

It is a familiar rule that a party against whom relief is sought shall be remitted, if possible, to the position he occupied before the transaction complained of before he can become entitled to a rescission of the contract. In other words, the defendant herein may not ask a rescission of the contract in question, and yet, at the same time, retain the benefits of that contract.

This rule of law is well stated in the case, *Neblett* v. *Macfarland* (92 U. S., 103), as follows:

"In cases of this character, the general principle is that he who seeks equity must do equity, that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle that, as the transaction ought never to have taken place, *the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction.* (*Bellamy* v. *Sabine*, 2 Phil., 425; *Samy* v. *King*, 5 H. L., 627; *W. B. of Scotland* v. *Addie*, L. R. 1 Scotch App. Case, 162; *Gatley* v. *Newell*, 9 Ind., 572; *Johnson* v. *Jones*, 13 Sm. & Meeson, 580; *Kerr on Fraud*, 335, 343.) This is no doubt the general rule."

See the same thing stated, and authorities cited in note, in Bigelow on Fraud, pp. 40–89 (Edition of 1877).

In the present case it is admitted by the defendant, Fisher, himself, that he never did make any unconditional tender or offer to pay anything for the goods actually ordered and received, but, on the contrary, declined to make any such tender or offer to pay anything at all unless the plaintiff company "would throw up the whole contract." (*R., pp. 51–3.*)

Such conditional tender is, of course, not a valid tender in law. As has been stated by this court in the case of *Hepburn* v. *Auld* (1 Cranch, 321), "a tender on condition "that a release of all demands should be first delivered "is not good, unless such prior delivery is expressly "stipulated in the contract."

As has been above shown, the defendant company not only failed to make any valid tender or offer, but likewise failed to plead the same or to bring the money into court, or to return, or offer to return, the goods.

In the case of *Sheredine* v. *Gaul* (2 Dall., 190), it was held:

"A mere offer to pay the money is not, in legal strictness, a tender; and, even if the tender were in itself suf-

ficient, the defendant is not entitled to take advantage of it, unless he pleads it, and brings the money into court; for a verdict now given in his favor on the present pleading would forever discharge him from the plaintiff's demand."

It, therefore, results that the defendant in this case may not be permitted to ask the rescission of the contract in suit and at the same time retain the benefits of goods ordered by it and received, amounting, in the aggregate, to the sum of $1,978.25, and for which no payment whatever has been made.

Conclusion.

From all of the foregoing, it is most apparent that, in the trial of this case in the court below, the plaintiff was deprived of substantial rights, and that the judgment should be by this court set aside and the case remanded for a new trial.

Respectfully submitted.

JEREMIAH M. WILSON,
For Plaintiff in Error.

F. W. VON COTZHAUSEN,
Of Counsel.

Supreme Court, U. S.
MAR 27 1897
JAMES H. McKENNEY,
CLERK.

166-464

IN THE

Supreme Court of the United States.

October Term, 1896.

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THE AMERICAN PUBLISHING COMPANY,
Plaintiff in Error,

vs.

A. FISHER AND AARON KEYSER, Co-partners, doing business under the firm-name of A. Fisher Brewing Co., *Defendants in Error.*

BRIEF OF COUNSEL IN BEHALF OF THE DEFENDANTS IN ERROR.

J. L. RAWLINS,
Attorney for Defendants in Error.

McGILL & WALLACE, LAW PRINTERS, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE AMERICAN PUBLISHING COMPANY,
PLAINTIFF IN ERROR,

vs.

A. FISHER AND AARON KEYSER, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM-NAME OF A. FISHER BREWING CO., DEFENDANTS IN ERROR.

Brief of Counsel in Behalf of the Defendants in Error.

This is an action brought by the plaintiff in error to recover upon a special contract. The alleged contract is for the sale of stationery, views, and advertising material for the defendants' brewery at the cost of $20,844.75.

The making and delivery of the contract and its ratification, as well as the approval and acceptance of the goods, are put in issue by the answer. It is also affirmatively set up in the answer that the alleged agreement was never signed nor delivered to take effect as a contract; that it was procured by plaintiff by misrepresentations and for fraudulent purpose; that it was fraudulently altered; that not only the agreement, as alleged,

but also the subsequent alleged approvals of it and of the articles mentioned in it were forgeries; that the defendants were induced by fraud to take the goods from the depot; that all the acts of plaintiff were to carry out a general scheme of fraud; that the alleged agreement was so extortionate and unconscionable as to be a nullity; that the goods mentioned never having been accepted or used by defendants, but held subject to plaintiff's order, of which it was promptly notified as soon as the fraud was discovered by the defendants, the latter incurred no liability.

While the question of the sufficiency of the evidence to justify the verdict can not be considered by this Court, yet that the Court may be informed as to the nature of the case, and be able to consider the questions of law raised in the light of the facts, before considering the law, we shall first outline the facts.

I.

There was no agreement or subsequent ratification or approval of the alleged agreement, or any acceptance of the articles therein mentioned. Every step taken by the plaintiff and its agents to procure such agreement and its approval, and to induce the defendants to accept and pay for the goods, was marked by falsehood and forgery. A review of the evidence will show that the whole transaction was a gigantic scheme of fraud cunningly devised and adroitly executed with a view to mislead, entrap, and ruin the defendants. The effect of the scheme, if successful, would have been to load the defendants, at ruinous cost, with stuff which they could never use. Without more, the transaction itself was so oppressive and unconscionable as to make plain its fraudulent character, and afford the Court just and legal cause to nullify its effect.

Mr. Cotzhausen (treasurer of the plaintiff) was first introduced to Fisher at Heims' brewery, in Kansas City. Some months later, in March, 1890, he came down one Sunday afternoon to Fisher's brewery to solicit an order. That he might ingratiate himself and prepare the way, he begins by asking the price of real estate—says he wants to buy, etc. Finally, getting down to business, he broaches the subject of beer labels, and opens with a suggestion that he get up a trade mark for the labels of defendants. Finding that Fisher was paying but 55c. per thousand for labels without a trade mark, he offers to get up such a design and to furnish labels for 75c. per thousand. Fisher was unwilling to pay this price, so he, Cotzhausen, finally agreed to furnish them at the same price, but only in the quantity of one and a half million labels. Fisher tells him that this quantity will last him three years, but upon the assurance of Cotzhausen that he would undertake at this ruinously low price to make them only at odd times when business was dull, and to furnish them as they might be needed, it was finally agreed that designs might be prepared and submitted for a trade mark, and that, if satisfactory, an order would be placed in the amount stated.

From this auspicious beginning it was an easy transition to other advertising matter and stationery, and the wily Cotzhausen suggests that it might be a good idea for Fisher to have this trade mark embodied in all his work, and for him to keep by him a list of the articles which Cotzhausen's house could furnish, and the quantities, etc., so that at any time when needed by him he could order directly. And that he might know that the work when ordered was satisfactory it was the plan that in all cases designs should be furnished him for his approval.

So they chatted on, passing from one subject to another, Cotzhausen adding to the memorandum or price list as the conversation progressed.

One especial feature of the advertising matter, which is, of course, ordinarily renewed every season, so as to keep something new before the public, was a bird's-eye view which plaintiff was preparing for the railroads, Chamber of Commerce, and Real Estate Exchange. Fisher declined to give any order for any except they should have first been approved by the Real Estate Exchange, and said that when they were out, and so approved, he might take a hundred of them, but that the price must be down below 97½ c.

Cotzhausen spoke of a hanger, a sort of advertising medium, which, from the description given, Fisher thought also might be a good thing, and a memorandum of this also was made, and the price, together with the quantity up to which they would agree to furnish them. It is well to notice that no dimensions or description either of this or of the bock beer card, or of the weight and quality of the stationery, or of the size or general character of the bird's-eye view was given in the memorandum, the reason evidently being that as it was no order for the goods, or binding contract between the parties, no such details were deemed necessary.

Having completed the memorandum, Fisher was asked to attach his name to it. Upon his demurring that he was not prepared to place an order, he was calmly assured by the agent that no such thing was intended, that as it was Sunday there would be no validity in it anyhow; but that the real and only object of the request was so that the house might know that defendants' firm had been visited and prices given to them, and that they might feel assured that there was reasonable ground to expect an order if the work was satisfactory. It was explained, no doubt, very smoothly, that some of their agents, in order to create the impression that they were doing a large business, had, upon occasions, requested sketches to be sent to various firms,

and it was afterwards discovered that the agent had not visited the firm; that, therefore, the house adopted the rule that in each instance, where sketches were ordered, the signature of some responsible member of the firm must be attached.

Looking back at it now, in the light of all that followed, we may at first conclude that Fisher did not exercise "the ordinary care and prudence" necessary to protect himself, which counsel for appellant insists must be shown. But we all know (some of us by experience) that by the art of the confidence man ordinary care and business precautions are made to seem hypercriticism or ungenerous suspicions.

So, as an act of courtesy, Mr. Fisher placed his name to the paper. He wrote nothing else on it, and the jury has found that the wording which appears above the name, cramped and interlined, as it there appears, were placed there by Cotzhausen after the paper had been signed. What purports to be a duplicate was left with Fisher, and this was placed in a desk at the brewery, and was seen and referred to but once afterwards by Fisher. (46.)

Every word of this so-called agreement is in the handwriting of Cotzhausen, and is upon paper furnished by him. The statement of appellant in his brief that the paper was furnished by Fisher is an error.

In April, 1890, the witness, Charles J. Smith, appears upon the scene with certain designs for trade mark and stationery, which he submitted to Fisher for his approval. Fisher examined them, and after noting some changes to be made, signified his approval, and, at the request of Smith, wrote his name upon the back of the various sketches.

Upon this first occasion Fisher got out his memorandum and examined it, comparing the designs submitted with the proposal left with him by Cotzhausen. This

done, and his name written upon the back as requested, he placed the memorandum back in his desk, and did not again see it, nor did he see any copy of it until the original was presented in court at the trial. (46.)

Some time during this visit of Smith there was some talk about stationery, letter heads, bill heads and small advertising cards. The bookkeeper of defendants, Williams, was accustomed to buy this class of material for the firm (38, 46), and Fisher told him that the parties were making samples, and that orders could be made from them whenever they were in need of such articles. Williams then asked for prices (38), and when Smith said they would have to be furnished by the house, it was arranged that the prices were to be given at once by letter, and if satisfactory, the order was to be considered placed for ten thousand various sorts of letter and bill heads and six thousand small advertising cards. No prices were ever given for this stationery, and the only order ever given for it was the conditional one above set forth. The only order really placed at this time was one for one and one-half million labels. Some time after this an order was sent, on July 25 (17), for one thousand checks.

On August 30, 1890, a small box was shipped by plaintiff, and received on September 13. (17.) No letter, no invoice, no word of explanation of any kind was sent with the goods, and Williams, who received them, was unable to conjecture from whom they came unless from the Beck & Pauli Lithographing Company, whose imprint appeared upon them. Fisher was unable to tell him, because the proposal of Cotzhausen had been taken from his desk by Smith, on the occasion of the first visit. (See Martin, 60, Smith, 76, Fisher, 46.) Fisher had asked Kushbert to send him a copy in July (41), but none had ever been sent.

So the letter of defendants to B. & P. Lith. Co. of

September 13th (17) was sent. And this very letter is corroborative of the statements of Williams that he knew nothing of the existence of the March 28th proposal (41), and of the claim of Fisher that this proposal was not intended to operate as an order or contract. Otherwise Williams would have known that they were as much obligated to take the mems. as any other part of the stationery, and besides would have addressed his letter to the proper party, and Fisher would have been equally well advised.

The answer to this letter is artistic in the cool impudence and fraudulent design with which, in closing, the writer hopes for "a continuance of defendants' kind patronage in the future." It was to prevent any suspicion from being aroused in the defendants as to the quantity and cost of the stuff until they had received it. According to the contention of plaintiff, at that moment it had defendants' written contract for material to the amount of over $20,000. Observe, now, that this is the only letter received from plaintiff, and that no bill for any of this stuff was received during the year 1890. This is remarkable in view of the proposal which fixes the terms as cash on delivery. So careful was plaintiff not to call any more attention than possible to the terms of the written proposal of March 28th than was absolutely necessary, that no mention was made of any bill for these goods until the letter containing invoice received by defendants January 24, 1891, which was after all the goods were about ready for shipment, though no mention is made of this fact.

If for any occult reason it was deemed inadvisable to send the invoice by mail, could it not have been delivered by Smith, who visited defendants in October and again in December?

But to return to the narrative, Smith appeared again on the scene with proofs in October, procuring the signature

of Fisher in approval, and in December came for the last time with the final proof of bird's-eye view and compliment card attached. This last visit deserves more than passing mention. It is beyond question, from the testimony of plaintiff's own witness, Kushbert, that Fisher's copy of the proposal had disappeared. Whether lost, or, as we claim, abstracted from the desk by Smith, the result was the same. He had no means of referring to its terms or of refreshing his memory as to its contents. He could not even be expected to remember its date (which differed from the true date when it was signed).

Yet we find that the approvals as they now appear on the exhibits presented on these latter occasions make special reference to the agreement by its date. We call particular attention to Exhibit 11, and the endorsement thereon. When this was presented for approval Williams was present. Smith tells us (69) that when he appeared Williams said: "You have got a hell of a contract with Fisher here, haven't you—more stuff than we could use in a hundred years." And yet, after that remark, showing his dissatisfaction with the bargain made by his employer, Smith would have us believe that Fisher and Williams calmly and deliberately proceeded to approve the view, and to order all the goods mentioned in the agreement of 3–28–90, shipped immediately by January. Fisher must, according to plaintiff, have known that this involved the immediate shipment to him of the mass of advertising matter, sufficient to flood the Rocky Mountain region. Though Williams thought it "a hell of a contract," and that the stuff was more than could be used in a hundred years, he stood by, and, without objection, allowed Fisher to order it all at once, "by January," doubtless in order that one of the beautiful checks might be filled out for $20,000. And yet they insist Fisher was "a close trader." This

story of Smith's is incredible. It is not even artistic. It is all that is necessary to convince one of the truthfulness of Fisher's statement that he did nothing but sign his name upon the view, and that the rest was written in over it. (52.) The very appearance of the writing shows this to be the fact. Nothing was easier than for Smith to erase the pencil marks on the back, and with his fountain pen, the same one with which Fisher signed, to write in at his leisure the words which now appear. (Pages 74, 75.)

At this time Fisher ordered 250 of the views at 80 cents. Williams, in his deposition, tells us (36) how this number came to be ordered, and what occurred on this occasion.

Now that the proofs are all approved, and Fisher's name has been signed to everything necessary under the contract, the next step is to procure by some easy and plausible means an apparent ratification of what has been done, and a recognition of the binding force of the March agreement. Cotzhausen was doubtless advised that a payment of the bill for such work as had been done would furnish such proof, and hence the invoice received at Salt Lake by mail January 24th. This is the first time anything of importance has been entrusted to the mail. The bill bears date December 15th. Smith had been at Salt Lake on the 26th, yet it was not presented for more than a month after its date. The reason is obvious.

This bill was not paid as expected, the letter written by Williams (19) giving the reason. This was received by Cotzhausen, and answered on the 28th. The latter again in this letter, with grim humor, says, "We beg to solicit a continuance of your kind patronage, which is appreciated most highly by us, and hope to be favored by any other new work that you may need in our line." At that very moment there were, boxed up in his factory,

bird's-eye views for Fisher, sufficient in number to supply every store, saloon, or other public place in the whole Inter-Mountain region, bock beer cards in equal number, and Shakespearean cards for every man, woman and child in Utah, Nevada, and Idaho, including Indians and Chinamen.

Now comes the artistic part of the job. Realizing that if presented with a bill for $18,000 for these goods, and asked to pay freight on them, Mr. Fisher would refuse to take them from the depot, Cotzhausen divides the shipment in his bill, making first a bill for some $2,045, and next a bill for $16,000. In order that there may seem to be some excuse for this, he pretends that the goods have been shipped in separate lots, the $2,000 worth on January 30, and the remainder on the next day. How flimsy this pretext was, is disclosed by respondent's abstract, where his cross-examination is set out at length.

This bill for $2,055 was not sent by mail in due course, but presented by Smith in person on February 23, 1891. (39.) He represented that the goods were at the depot, and that they were shipped with goods for other parties, and that he desired Fisher to pay the freight upon the whole consignment. Not yet suspecting the scheme, Fisher advances the freight, between $300 and $400, and orders the goods brought over. Upon being informed of the number and weight of packages marked for him, Fisher expressed surprise, but was reassured by Smith, who remarked that he (Fisher) had no idea how such stuff weighed.

The bill then presented, it will be remarked, contained just those items (with the exception of the 6,000 Shakespearean cards) which had been from time to time ordered, either absolutely or conditionally. This bill (with that of December 15) embraced the stationery for which Williams had given the conditional order—the one and one-

half million labels, the check book, the 300 bock beer cards, and the 250 views, and Cotzhausen well knew it, so they were reserved for a later bill. Still this bill was not paid, and a few days later, just about time enough for Cotzhausen to arrive from Milwaukee, he appears upon the scene, and still presenting only the $2,055 and the $181 bills, seeks to effect a settlement of those bills by knocking off some $600. Fisher agrees to this, if that reduction will settle the matter between them, but this, of course, was not what Cotzhausen was after. All he wanted was payment for part of the goods, under such circumstances as would make it a ratification of everything done under the proposal of March 28th. Failing in this, he hunts up an attorney, and the first glimpse of the $16,000 bill is obtained some days afterwards by Fisher in his own attorney's office. (56.)

What reason, we may here pause to ask, could Cotzhausen have for suppressing either bill until after the goods were here at the depot, and what reason for suppressing the larger bill while insisting on payment for the smaller, except that he knew Fisher was not liable for the goods—that the proposal of March 28th was a false and forged instrument? The goods were never accepted by the defendant. The carting of them from the depot was procured by Smith under false representations. (50.)

A word or two as to Smith's interest in the case. We have seen his part in the transaction. It consisted in calling upon defendants once with sketches, twice with proofs, and once with the bill—four visits in all. He did not take the order for this mass of work. Cotzhausen must claim all the honor of that. Smith was regularly in the employ of the plaintiff, and tells us (60) that he is to receive for his services in this transaction, in case the plaintiff recovers, $2,000. What legitimate business would or could afford to pay at such rates for the trivial

service performed by this man? This very fact throws a flood of light upon the nature of the transaction and Smith's relation to it.

II.

The alleged error that the court admitted evidence at variance with the written contract is not well taken. All the evidence admitted was relevant and material as bearing upon the execution and delivery of the alleged contract as well as to fraud in its procurement. If the paper alleged had been sufficient in its terms to constitute a contract, without delivery it would be without binding effect as such. The evidence showed that no such delivery took place. It was the express understanding at the time of its execution that it should be held as a price-list and memorandum of articles which might be ordered by the defendants whenever and only as the same might be needed. To suffer the plaintiff to make any other use of the paper would be to enable it to profit by its own fraud.

The case of Burke *v.* Dulaney (153 U. S., 228) is decisive upon this point. The court used this language (233):

"And the evidence offered by the appellant and excluded by the court did not in any true sense contradict the terms of the writing in suit nor vary their legal import; but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not—except in a named contin-

gency—to become a contract or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is, undoubtedly, *prima facie*, indeed, should be deemed strong evidence that the instrument came to the hands of the payee as an obligation of the maker, enforcible according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing as the promissory note of the maker, payable at all events and according to its terms. The rule that excludes parol evidence in contradiction to a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract. The authorities supporting these views are numerous, and to some of them it will be well to refer."

See authorities cited—

Ware *v.* Allen, 128 U. S., 590–595;
Pym *v.* Campbell, 6 El. & Bl., 370–373;
Wilson *v.* Powers, 131 Mass., 539;
Benton *v.* Martin, 52 N. Y., 570–574;
Reynolds *v.* Robinson, 110 N. Y., 654.

III.

The evidence offered to show the fraudulent character of the transaction was clearly admissible and the objection thereto properly overruled.

In the case of Earl of Chesterfield *v.* Janssen (2 Ves. Sen., 125, 155), Lord Hardwicke arranged all the forms

of fraud in four classes, the first two of which he gives as follows:

"1. Then fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case. 2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous, might be cited James *v.* Morgan, 1 Lev., 111."

This Court in Hume *v.* United States (132 U. S., 406), approves the foregoing and uses this language (413):

"The true principle deducible from the authorities, and most consistent with the reason of the thing, seems to be this: In the instance of a special contract which has been wholly executed and the time of payment passed, if the plaintiff proceeds in general assumpsit, the express contract is only evidence of the value of the consideration, which is open to attack by the defendant in reduction of damages. But, when the action is in special assumpsit, the express promise of the defendant fixes the measure of damages to which the plaintiff is entitled. And while the general rule is that the performance of every contract may be resisted on the ground of fraud, at law as well as in equity, yet upon a contract of sale, the defendant having accepted performance, can not interpose this defense to defeat the contract, unless he returns the article or proves it to have been entirely worthless, though he may ordinarily recoup the damages which he can show he has sustained through the fraud.

"And there may be contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception, or at least to require but slight additional evidence to justify such presumption. In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defense at law as to sustain an application for affirmative relief in equity.

"When this is so, if performance has been accepted in ignorance and under circumstances excusing the non-return of articles furnished, and these have some value, the amount sued for may be reduced to that value."

In the case at bar the goods were not accepted or appropriated, hence there was no right of recovery. The checks were not ordered or received from plaintiff.

A delivery made surreptitiously, and an acceptance and appropriation induced by fraud, create no liability.

Schutz *v.* Jordan, 141 U. S., 213.

Fraudulent representation as to value peculiarly within the knowledge of the party making them are sufficient to avoid a contract obtained thereby.

Hirschberg *v.* Dalton, (Utah) 27 Pac., 82;
Pickard *v.* McCornick, 11 Mich., 68;
Kost *v.* Bender, 25 Mich., 515.

IV.

The question of the validity of the verdict rendered by nine of the eleven jurors is not properly before the court. It does not appear from the record that plaintiff made any objection to the reception of the verdict or the entry of judgment thereon, or claimed any violation of the Constitution.

The following is all that appears in the record relating to this question:

"The court further charges you that the concurrence of nine or more members of the jury is essential to your verdict, and that all who agree to it should sign it. (To which last charge the plaintiff duly excepted.) The jury having retired and deliberated, returned a written verdict into court on the 12th day of December, 1892,

'finding the issues for the defendant,' signed by nine (9) of its members, the others refusing to concur therein. Which verdict the court then and there received and caused to be entered upon the record. To which action of the court the plaintiff excepted."

It appears that plaintiff "duly excepted to the charge," but whether such exception was taken before the jury retired or not the record is silent.

But the charge is immaterial except as it was acted upon.

The only way to raise the question of the sufficiency of the verdict is by objecting to its being received by the court and recorded, and in case such objection is overruled by then and there excepting to such ruling.

State *v.* Austin, 6 Wis., 205;
Farrell *v.* Hennessey, 21 Wis., 632;
Costly *v.* Com., 118 Mass., 1;
Cross *v.* Grant (N. H.) 13 Am. St., 607;
Water Co. *v.* Richardson, 72 Cal., 598;
Algier *v.* Steamer Maria, 14 Cal., 177.

Plaintiff in this case simply excepted to the action of the court after it had been taken—when, does not appear.

Exception to the admission of evidence to which no objection had been made might as well be said to be good. This was insufficient.

U. S. *v.* Breitling, 20 How., 252;
Dredge *v.* Forsyth, 2 Black, 563;
Stantin *v.* Embry, 93 U. S., 548;
United States *v.* Carey, 110 U. S., 51;
Pacific Express Co. *v.* Malin, 132 U. S. 538.

V.

The plaintiff, if not satisfied with the definiteness and particularity of the allegations, should have attacked the pleading upon that ground before trial. A general objection to either complaint or answer which seeks to shut out evidence at the moment of the trial is not favored.

Disbrow *v.* Harris, 122 N. Y., 366;
People *v.* Reis, 76 Cal., 280;
Jehama Co. *v.* Bryan, 8 Pac. R., 674;
Seligman *v.* Armando, 94 Cal., 316.

VI.

The granting, or refusal to grant, leave to file amendments to pleadings, is discretionary with the trial court and not reviewable in this court.

Bullit Co. *v.* Washer, 130 U. S., 142;
Chapman *v.* Barney, 129 U. S., 677;
Central Trust Co. *v.* Grant Locomotive Works, 135 U. S., 207.

In Bullit *v.* Washer (*supra*) this court (130 U. S., 145), says:

"The first assignment of error, namely, that the court erred in allowing the second amended petition to be filed, has been so frequently considered and declared unfounded by this court, that it may be dismissed with the remark that amendments are discretionary with the court below and not reviewable here."

There was clearly no abuse of discretion in allowing the amendment to be filed in this case. It was in harmony with the defenses originally set up; it made

more definite the allegations of fraud contained in the original answer. That it was sufficient to constitute a defense has already been shown.

VII.

The review of the evidence will clearly show that there is no ground for the contention that a subsequent ratification of the contract (procured by fraud) took place. As already pointed out, every step to procure such ratification was, itself, attended with fraud and forgery.

VIII.

The point made in the brief on the other side, that there was no offer to return or pay for the goods by the defendants, is not well taken.

The plaintiff's action was founded on a special written contract. To have permitted it to recover upon a contract not alleged, or upon a *quantum meruit*, would have been to enter judgment in a case not within the pleadings.

But the plaintiff was promptly notified by the defendants, as soon as the fraud was discovered, that they would not accept the goods, and that the entire shipment, with the exception of the labels, bock cards, and check box, was held subject to plaintiff's order and at its risk. (See letter-record, page 20.) As to the check book, it was ordered and received from the Beck & Pauli Lithograph Company. As to the labels, bock cards, and 250 views at 80c. each, they were all arranged for and received under a special agreement not alleged in the complaint. It further appears that Fisher was at all times ready and willing to pay for these in accordance with the agreement under which they were bought.

IX.

There was no error in sustaining the objection to the following question propounded to Cotzhausen: "Now, I ask you whether you at any time in your dealings with Fisher, personally or otherwise, intentionally or unintentionally, did anything to mislead him?"

The question was objectionable for a great many reasons. It was a conclusion as to what effect his misrepresentations had upon Fisher. It was a statement of something he could not know. It was asking for his opinion upon the acts he did, and not upon his intention. We admit that in some classes of cases where fraud is involved, you may ask the witness what his intention was. He was not asked whether he intended to deceive Fisher. It is doubtful whether in this class of cases such a question could be received, but it is certain that the question asked could not be permitted here under the issues involved.

X.

The making and delivery of the paper, whatever it was, took place on Sunday, and the transaction was void for illegality.

The statutes of Utah (II Compiled Laws, 1888, page 595), provide:

"SEC. 4519. Every person who performs any unnecessary labor, or does any unnecessary business on Sunday

is guilty of a misdemeanor and shall be fined in any sum not exceeding twenty-five dollars."

See—

Gibbs & Sterrett Mfg. Company *v.* Brucker, 111 U. S., 595;

Bricher *v.* Cheshire Ry. Co., 125 U. S., 55.

XI.

The charge of the court very clearly and accurately stated the law as applicable to the case. In some respects it was more favorable to the plaintiff than it had a right to demand. It substantially covered all the points concerning which the plaintiff had a right to ask that the jury be informed. The requests as made by the plaintiff consisted chiefly of controverted questions of fact, mingled with argument and erroneous statements of law, and in each instance the request was properly denied.

XII.

It is submitted that this case was fairly tried before the jury who were abundantly justified in deciding all the controverted questions of fact in favor of the defendants. Indeed, any other conclusion than that arrived at would have been a gross perversion of justice. The judgment of the lower court should be affirmed.

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